IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

40

No. [redacted] 40

THE TEXAS COMPANY, *a Corporation*,
Appellee,
VERSUS
OKLAHOMA TAX COMMISSION,
Appellant.

41

No. [redacted] 41

MAGNOLIA PETROLEUM COMPANY, *a Corporation*,
Appellee,
VERSUS
OKLAHOMA TAX COMMISSION,
Appellant.

BRIEF OF APPELLANT

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JULY, 1948.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 703

THE TEXAS COMPANY, *a Corporation,*
Appellee,
VERSUS
OKLAHOMA TAX COMMISSION,
Appellant.

No. 704

MAGNOLIA PETROLEUM COMPANY, *a Corporation,*
Appellee,
VERSUS
OKLAHOMA TAX COMMISSION,
Appellant.

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The above styled and numbered appeals have been consolidated for both oral argument and briefing.

These cases arose through the Oklahoma Tax Commission making an assessment of the following enumerated taxes against the appellees:

1. A nondiscriminatory gross production tax in an amount equal to five per centum of the gross value of the oil, gas, and casinghead gas produced, but not to exceed what otherwise would be the rate for ad valorem purposes if subjected to that tax, the tax being levied in lieu of all other tax on the oil, gas, casinghead gas, and all appliances, tools and machinery directly used and employed in the production of oil and gas.

2. A non discriminatory tax of 1/8 of 1¢ per barrel on all oil produced prior to July 1, 1943, and the same character of tax in the ~~amount~~ of one mill per barrel on all oil produced after that date.

The properties from which the oil and gas were produced lie wholly within the territorial boundaries of the State of Oklahoma. The properties of the appellees used in producing the oil and gas admittedly had a taxable situs in Oklahoma and were subject to the taxes assessed if not impliedly exempt therefrom as federal instrumentalities. The appellees here assert that they were federal instrumentalities and the issue presented is probably limited to whether or not the appellees as federal instrumentalities are exempt from the taxes assessed.

The Texas Company paid taxes assessed under protest and filed suit in the District Court of Oklahoma County, Oklahoma, to recover the taxes so paid. The Tax Com-

mission interposed a demurrer to the petition and the demurrer was by the trial court sustained. The Texas Company elected not to plead further and the case was thereupon dismissed. From the judgment of dismissal, the Texas Company appealed to the Supreme Court of Oklahoma.

The Magnolia Petroleum Company paid the taxes assessed under protest and filed formal ~~written~~ protests. The protests were consolidated for hearing before the Tax Commission. After the hearing was had on the consolidated protests, the Tax Commission sustained the tax assessment in its entirety and the Magnolia Petroleum Company perfected an appeal direct to the Supreme Court of Oklahoma.

On September 23, 1947, the Supreme Court of Oklahoma handed down separate opinions in the cases. The judgment of the lower tribunal in each case was reversed. Thereafter the appellant filed a petition for rehearing. The petition for rehearing was denied January 27, 1948, and appellant then perfected separate appeals to this Court.

After the opinion was handed down by the Supreme Court in the *Texas Company case* but prior to the denial of the petition for rehearing in that case, the appellant filed in the case a motion wherein it admitted the correctness of all facts well pleaded by the Texas Company in its petition and requested the Supreme Court to render final judgment therein so as to avoid the necessity of the case going back to the District Court for judgment and then coming back up on appeal. The motion was by the Supreme Court

sustained and on January 22, 1948, final judgment was rendered in favor of the Texas Company. See Texas record, page 44. It follows that the decisions of the Supreme Court of Oklahoma in both the *Texas Company case* and the *Magnolia Petroleum Company case* are now final judgments.

No question is here raised in connection with the jurisdiction of the lower tribunals, nor is there any question of sufficiency of the pleadings involved. The cases are here on their merits.

THE OPINION

The principal opinion was handed down in the *Texas Company case* (Tex. R. 36-39). The rule of law laid down in the case is stated in the syllabus as follows:

> "1. A lessee producing oil from lands of restricted Kiowa and Apache Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state excise tax of one-eighth of one cent per parrel, nor the state gross production tax of five per cent of the value of the oil produced."

The substance of the opinion is this:

(1) That this Court had held that a lessee under a departmental lease covering the lands of restricted Indians is a federal instrumentality;

(2) That this Court had denied unto Oklahoma the right to impose a gross production tax in the case of *Large Oil Company v. Howard*, 248 U.S. 549, and the right to impose the proration tax was denied in *Barnsdall Refining Company v. Oklahoma Tax Commission*, 296 U.S. 51; and that it had thus been established by this Court that such taxes could not be imposed on the appellees in the absence of consent of Congress;

(3) That the cases above referred to were not expressly overruled by the *Helvering v. Mountain Producers' case*, 303 U.S. 376; that income taxes were involved in that case and not gross production and proration taxes. The Court then stated that:

> "It is the view of the writer of this opinion, speaking for himself alone, that for the reasons pointed out in the briefs one might well join in the request that the Supreme Court of the United States reconsider this question as applied to a tax on the oil as it did reconsider the question as applied to the tax on the personal income or net profit of the oil producer, which consideration resulted in a reversal of the rule as to such income tax as we have noted. But it is thought beyond the power of this court to now engage in such reconsideration, in view of the cited decisions of the higher authority which thus far wholly sustain the claim of 'Company' to immunity from the tax here involved.
>
> "Upon questions of federal law, citizens and their attorneys have the right to rely upon decisions of the Supreme Court of the United States, and upon such questions it is our fixed duty to follow such decisions, leaving to the United States Congress or Supreme Court the making of the necessary changes in such legal rules."

In the *Magnolia Petroleum Company case*, the Supreme Court of Oklahoma in effect adopted the syllabus in the *Texas case* as the law of that case. In the body of the opinion the decision in the *Texas Company case* was, in effect, adopted (Mag. R. 30-31).

STATEMENT OF FACTS IN THE TEXAS CASE

The restricted Indians involved in the *Texas case* are all members of the Apache Tribe. All of the properties involved are located in Caddo County, Oklahoma. Three oil and gas leases are involved in this case. One of the leases is under date of January 12, 1938, and covers 40 acres of minerals. Tsa-ah-se-zah (Blanche Achilta) is the lessor and Quintin Little was the lessee (R. 11-14). Another lease involved is under date of January 23, 1937; it covers 159 acres of land. Oliver Maynahonah and W. B. McCown, Superintendent for the Kiowa Indian Agency, for and on behalf of Kosope Maynahonah, a minor, are the lessors and Clyde M. Becker was the lessee (R. 15-18). The other lease involved is under date of January 23, 1937; it covers 160 acres of land. Julia Mulkehay, Chale-Tsin, and Ellen Mulkehay, adults, and also W. B. McCown, Superintendent for the Kiowa Indian Agency for and on behalf of Philip Tooisgah, then a minor, are the lessors and Clyde M. Becker was the lessee (R. 19-22a).

All of the leases are for the primary term of ten years and so long thereafter as oil or gas is produced in paying quantities. The royalty reserved is one-eighth of the oil,

gas or casinghead gas produced. Each Indian reserved the right to take his one-eighth royalty interest in kind.

At the time the taxes in controversy were assessed, the Texas Company owned by way of assignment all right, title and interest in the leases, subject only to the one-eighth royalty interest reserved by the Indian (Par. 3 of petition, R. 4).

At the time the leases were entered into, the lands covered by the leases were owned by restricted Indians. The lands were not subject to alienation without the consent of the Secretary of the Interior. All of the leases were approved by the Secretary of the Interior. At the time the taxes were assessed, none of the lands, except an undivided 7/16 of the minerals in and under the lease last above referred to, were subject to alienation. During the period of time that the taxes accrued, the 7/16 interest above referred to was owned by non-Indians and the Texas Company paid 7/16 of the taxes levied against it in connection with this particular lease. Therefore, only 9/16 of the taxes levied are here protested.

The taxes were assessed on October 30, 1942. The assessment as to tracts was as follows: Tract No. 1, $492.33 as gross production taxes and $10.01 as proration taxes; Tract No. 2, $491.13 as gross production taxes and $9.92 as proration taxes; and on Tract No. 3, $914.23 as gross production taxes and $18.43 as proration taxes (See Par. 13 of the petition, R. 7-8). As aforesaid, these taxes were paid under protest and suit was brought to recover.

STATEMENT OF FACTS IN THE MAGNOLIA CASE

Seven different oil and gas leases are involved in this case. However, there were only four assessments of taxes; these assessments were protested before the Oklahoma Tax Commission. They were there numbered 1748, 1749, 1750 and 1751. The protests and assessments were by agreement of the parties consolidated for hearing before the Oklahoma Tax Commission and should be considered as consolidated here.

Where restricted Indians are involved they are members of the Apache, Comanche, Citizen Pottawatomie, and Otoe & Missouria Tribes. Th properties are located in the Counties of Pottawatomie, Caddo, Stephen's and Pawnee, Oklahoma. Four separate stipulations covering the facts were entered into, one in connection with each protest. (See R. 6-18). We are inclined to believe that no detailed factual statement is necessary in connection with the particular tracts owned, the number of acres in each tract, the names of the several Indian lessors, etc., and that a general statement of the facts will suffice.

All leases involved are departmental leases—leases covering lands in which restricted Indians owned an interest. The Secretary of the Interior approved all of the leases. When the taxes in controversy were assessed in connection with the Pau-Kune lease and the Kla-da-ing lease, undivided interests in the minerals were owned by non-Indians. See Paragraph No. 6 of stipulation in No. 1750 (R. 18), and Paragraph No. 2 of stipulation in No. 1750 (R. 14).

All of the leases are for the primary term of ten years and as long thereafter as oil or gas is produced in paying quantities. The royalty reserved is one-eighth of the oil or gas produced. Each Indian reserved the right to take his one-eighth royalty interest in kind.

At the time the taxes were assessed, the Magnolia Petroleum Company owned all right, title and interest in the leases, subject only to 1/8 royalty interest reserved in the Indian. In some instances Magnolia was the original lessee and in others it held by way of assignment.

In Case No. 1748, the taxes assessed covered a period from June 1, 1942, to March 1, 1946. The gross production taxes assessed totaled $37,053.71 and proration taxes totaled $679.84 (R. 26).

In Case No. 1749, the taxes assessed covered a period from June 1, 1942, to March 31, 1944. The gross production taxes assessed totaled $389.53 and the proration taxes totaled $7.67 (R. 26-27).

In Case No. 1750, the taxes assessed covered a period from June 1, 1942, to March 1, 1946. The gross production taxes assessed totaled $126.52 and the proration taxes totaled $2.07 (R. 27).

In Case No. 1751, the taxes assessed covered a period from June 1, 1942, to March 1, 1946. The gross production taxes assessed totaled $12,773.71 and the proration taxes totaled $233.89 (R. 27).

At the time the taxes were assessed in Case No. 1751, the Pau-Kune lease, the period being from June 1, 1942,

to March 1, 1946, one-third of the minerals in and under the tract were owned by a non-Indian. The assessment has been denied in its entirety. It follows that Oklahoma has been denied the right to tax even where a non-Indian owned an interest in the minerals.

At the time the taxes were assessed in Case No. 1750, the Kla-da-ing lease the period being from June 1, 1942, to March 1, 1946, one-fourth of the minerals were owned by the heirs of Mary Moleno. A fee simple patent had been issued to these heirs by the Secretary of the Interior and this one-fourth interest accordingly became unrestricted and is now unrestricted (R. 64-65). The right to assess taxes on this one-fourth interest has also been denied.

STATEMENT AS TO JURISDICTION

The Federal statutory provision believed to sustain the jurisdiction of this Court is Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925, [28 U.S.C.A., Sec. 344 (a)].

The Supreme Court of Oklahoma erroneously decided that an imposing of the taxes in controversy would violate an implied constitutional right of the appellees as Federal instrumentalities to be free of such taxes. In so holding, the court denied unto Oklahoma its inherent sovereign constitutional right as one of the states of the union to levy and collect taxes on properties lying wholly within her territorial boundaries. Art. X of the United States Constitution.

SPECIFICATION OF ERRORS

The Assignment of Errors in the *Texas case* are found at Tex. R. 49-53; in the *Magnolia Petroleum case*, they will be found at Mag. R. 39-42. The Assignment of Errors are substantially the same. It is for this reason that we are inclined to believe that a summary of the Assignment will suffice:

(1) The Supreme Court of Oklahoma erred in holding that an imposing of the tax in controversy was impliedly denied Oklahoma under the Constitution of the United States.

(2) The effect of the decision of the Supreme Court of Oklahoma is to deny unto Oklahoma its sovereign right and power as one of the sovereign states of the union to tax properties and subjects lying wholly within her territorial boundaries, which right exists in and is exercised by the other states of the union.

(3) The Supreme Court of Oklahoma erred in holding that an imposing of the taxes in controversy would burden the appellees as a Federal instrumentality.

(4) The Supreme Court of Oklahoma erred in construing the decision of this Court in connection with the issues here presented. Under the decision of this Court, the taxes here imposed are not considered to cast such a burden on or to create such an interference with the office and function of a Federal instrumentality as to violate the United States Constitution. Under the decision of this Court, the right to assess the taxes here assessed has been sustained.

ARGUMENT AND AUTHORITIES

Our argument and authorities in support of these assignments of error will be presented under five general propositions:

PROPOSITION No. 1

The gross production tax here assessed is a nondiscriminatory tax levied in lieu of ad valorem taxes. The tax was levied upon the properties of appellees in which no others owned an interest.

The appellees are private corporations that were organized to engage in business for profit. They domesticated in the State of Oklahoma many years ago. At all times here involved, they were authorized under the laws of the State of Oklahoma to engage in the oil and gas business, and did, during said time, engage in such business in Oklahoma for profit. The taxes here assessed were levied on the properties of the appellees. In these properties no one else owned an interest. The Magnolia Petroleum Company so stipulated in paragraph number 4 of the several stipulations of facts. We quote this paragraph:

> "That the Gross Production and Proration Taxes which the Oklahoma Tax Commission seeks to collect from Magnolia Petroleum Company in this proceeding are levied upon the interest of the Magnolia Petroleum Company in the said oil and gas lease covering the land first above described."

The taxes, therefore, were not levied on properties owned either by the United States or a restricted Indian. The sole and only connection that a restricted Indian had with these cases is that his restricted status brought the Federal Gov-

ernment in and thus a Federal instrumentality was created. He, the restricted Indian, then receded into the background and there remained. During the period of time in controversy, the restricted Indian performed no functions and did no supervising. He did nothing. It is true that his presence as a restricted Indian was at all times necessary but it was only necessary for the purpose of keeping alive a Federal instrumentality. If his restrictions had been removed, the Federal Government would have withdrawn and no Federal instrumentality would have existed. After production was had, the restricted Indian's relationship with the appellees and the appellee's relationship with the restricted Indian was no different than the relationship that exists between a lessee and a non-Indian royalty owner. The question here posed is whether or not the tax levied directly burdened the appellees as Federal instrumentalities by depriving them of the power to serve the Federal Government as it was by that Government intended that they should serve it? We confidently assert that under the facts here presented, this Court has answered the question, thus posed, in the negative.

The gross production taxes here assessed were levied under Section 821, Title 68, O.S. 1941. In so far as is here material, it is therein provided in substance that every person engaged in producing within Oklahoma, crude oil and natural gas, shall pay a tax equal to five per cent of the gross value of the oil and gas produced; that the payment of said tax shall be in full and in lieu of all taxes levied by the State, or any of its political subdivisions, upon any prop-

erty rights attached to or inherent in the right to said minerals, upon the mineral rights belonging to said land, upon the machinery, appliances and equipment used in and around any producing well, upon the oil, gas or other minerals during the tax year in which produced, and upon any investment in any leases, rights, minerals or other property above mentioned. The State Board of Equalization was given authority to adjust the rate of levy so as to conform to the average *ad valorem* rate. This section of the Statute is rather long and for such reason we include it in the appendix of this brief. This tax is a nondiscriminatory tax, levied for revenue purposes. It is apportioned as follows:

Seventy-eight per cent is placed to the credit of the State's General Revenue Fund to be used in defraying the general expenses of state government; 10% is paid to the County Treasury from whence the oil and gas was produced to be used in the county for highway construction and maintenance purposes. Another 10% is likewise apportioned for the use of the schools in the county. The remaining 2% is placed to the credit of the Tax Commission to be used for administration purposes. See Sec. 827, Title 68, O.S. 1941. As above stated, 20% of the moneys collected as gross production taxes are returned to the county from whence the oil and gas was produced and by that county used for school and highway purposes. A portion of the 78% so going into the General Revenue Fund also finds its way back to the County from whence the oil and gas was produced. In so far as schools are concerned, during the

period of July 1, 1941, to June 30, 1945, the Oklahoma Legislature appropriated approximately 63% of the General Revenue Funds for school purposes. For the period July 1, 1941, to June 30, 1943, approximately 38% was appropriated for the common schools and 25% for colleges and universities. For the period July 1, 1943, to June 30, 1945, approximately 40% was appropriated for the common schools and 23% for colleges and universities. Thus, restricted Indians who, as citizens of Oklahoma, attend Oklahoma's schools and use Oklahoma's highways, are directly benefited through the lessees' payment of the taxes in controversy. If the lessees are not required to pay the taxes, then the moneys go into its private treasury and the restricted Indian receives no benefit of any kind.

Oklahoma enacted a gross revenue tax in 1908. It was, in effect, a levy on the gross receipts of public service companies and on receipts of the producers of ore, oil and gas. In *Meyer* v. *Wells Fargo & Co.*, 223 U.S. 298, 32 S. Ct. 218, this Court held that the Act was unconstitutional when applied to a foreign public service company engaged in business partially within and partially without the state. The Act was amended in 1909 and 1910, but remained a gross revenue tax. In *Comanche Light and Power Co.* v. *Nix*, 53 Okla. 220, 156 Pac. 293, the Supreme Court of Oklahoma held the amended Act unconstitutional when applied to a domestic public service company. This opinion is based on the *Meyer case, supra.* Thereafter, in 1913, a gross production tax was enacted. This Act was from time

to time amended. See history at close of Sec. 821, *supra*, and author's statement of history in notes at PP. 539-540 of Title 68, O.S.A. The Gross Production Tax Act as amended in 1916, has not been materially changed. Since 1916, the constitutionality of the Act has been sustained a number of times by the Supreme Court of Oklahoma. In fact, the constitutionality of the Act is not here challenged by the appellees, except as applied to their properties on the lands of restricted Indians.

In *Shaffer* v. *Carter*, 252 U.S. 37, 40 S. Ct. 221, Oklahoma sought to impose income taxes on income accruing from oil and gas produced in Oklahoma. The taxpayer there contended that a gross production tax had been paid on the production and this tax was in lieu of all other taxes. This Court held that the gross production tax paid was a tax in lieu of an *ad valorem* tax and that payment thereof did not prevent Oklahoma from imposing an income tax. The Supreme Court of Oklahoma, in dealing with the Act as it has existed since 1916, has uniformly held that the tax here under discussion is: (1) a property tax; (2) imposed in lieu of an *ad valorem* tax and is a substitute therefor, and (3) the payment of a given per cent of the gross value of the oil and gas produced is merely a means of ascertaining the fair cash value of properties used in production and that the production or lack thereof merely goes to make up the value of the properties as a going concern.

We quote the 1st, 2nd, 14th and 15th syllabi of the Official Report in the case of *In re: Skelton Lead & Zinc*

Co.'s Gross Production Tax for 1919, 81 Okla. 134, 197 Pac. 495:

> "1. Under Chapter 39, Sess. Laws 1916: 'The Oklahoma "Gross Production Tax" imposed on oil and gas (lead and zinc) producing companies was intended as a substitute for the *ad valorem* "property tax." ' *Shaffer v. Carter*, 252 U.S. 37.
>
> "2. The 'gross production tax' levied under chapter 39, Sess. Laws 1916, is a 'property tax' purely, and is levied in full and in lieu of all other taxes, state, county, township, district, and municipal.
>
> * * * * *
>
> "14. The provision in chapter 39, Sess. Laws 1916, for the payment of a sum equal to 1½ per cent. of the gross value of lead and zinc products is merely a means or measure adopted by the Legislature for ascertaining the fair cash value of the mills, plants, machinery, equipments and other property used in the operation thereof, as a going concern.
>
> "15. The mills, plants, machinery, equipments, and all other property, being exclusively the private property of the lessee, and having a situs within this state, and not being exempt by law, are subject to state taxation, and the 'gross production tax,' being merely a measure for ascertaining the fair cash value of such property, is a valid tax."

We wish to direct the Court's attention to the fact that the Supreme Court of Oklahoma has uniformly held that the law adopted in the syllabus is the law of the case. See *Corbin v. Wilkinson*, 175 Okla. 247, 52 Pac. (2d) 45.

As late as 1936, the Supreme Court of Oklahoma reaffirmed the law as announced in the *Skelton case, supra*. This it did in the case of *State v. Indian Royalty Co.*, 177 Okla. 238, 58 Pac. (2d) 601. Our court there again points out that the Legislature had no other object than to levy

a property tax upon mining properties at their fair cash value, using the production therefrom as a yardstick. That the levy is not upon the mining products themselves, but upon all of the property used in producing the oil and gas. The issue there presented was whether or not an account receivable arising from oil sold in December but not paid for until the following January was subject to *ad valorem* tax. The court there held it was not subject to *ad valorem* tax for the reason that gross production taxes had been paid.

We wish to point out the properties upon which the taxes were levied in the instant case. When oil is produced, it is either flowed or pumped into flow or settling tanks. In these tanks the water and certain basic sediment that is produced with the oil is permitted to settle to the bottom of the tank. This settling process is often assisted through the use of chemicals. After this settling process has taken place, the crude oil in the tank is measured. This is the last step in the production phase. So considered by the oil fraternity and so considered by the appellant. It is here that the tax is levied. It follows, therefore, that the flow or settling tanks and all machinery, tools and equipment back thereof that are used in producing the oil and gas are subjected to the gross production tax and exempted from the *ad valorem* tax. Generally speaking, these properties would include the flow lines, derrick, pumping unit, rods, tubing, pipe, etc. In brief, any and all properties used in producing the oil and gas. If this Court sustains the Oklahoma Supreme Court and holds that the properties of the appellees are not

subject to gross production taxes, then all properties of the appellees that are used in producing the oil and gas, go tax free. This for the reason that Oklahoma has exempted these properties from *ad valorem* taxes believing that a gross production tax would be paid thereon.

The fact that the tax Oklahoma here seeks to impose is a property tax, and in effect an *ad valorem* tax, becomes material when it is remembered that this Court has always held that a state can impose an *ad valorem* tax on the properties of a Federal instrumentality. The correctness of our statement is established by the opinion of this Court in *Susquehanna Power Co. v. State Tax Commission of Maryland*, 283 U.S. 291, 51 S. Ct. 434. In that case, an *ad valorem* tax was imposed upon property of a contractor who had been licensed by the Federal Power Commission. Under the license he had contracted to build a dam for the purpose of impounding water to be used in connection with a power plant. The land assessed was inundated by the waters of the lake. The contract among other things provided that "in constructing and operating its power plant under the Federal license, it, and its lands and property used in the power project, are agencies or instrumentalities of the Federal Government, state taxation of which is impliedly prohibited by the Constitution." This Court held that notwithstanding the fact that the contractor was a Federal instrumentality, his properties used in connection therewith were subject to the tax assessed. We quote from the body of the opinion, Page 294, U.S. Report:

"(4) With that end in view, the distinction has long been taken between a privilege or franchise granted by the government to a private corporation in order to effect some governmental purpose, and the property employed by the grantee in the exercise of the privilege, but for private business advantage. The distinction was pointed out by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 436, 4 L. ed. 579, and in *Osborn* v. *Bank*, 9 Wheat. 738, 867, 6 L. ed. 204; see *Union Pac. Railroad Co.* v. *Peniston*, 18 Wall. 5, 34-37, 21 L. ed. 787. It has been followed without departure and property so owned and used has uniformly been held to be subject to state taxation. *Thomson* v. *Union Pacific Railroad Co.*, 9 Wall. 579, 19 L. ed. 792; *Central Pacific R. Co.* v. *California*, 162 U.S. 91, 16 S. Ct. 766, 40 L. ed. 903; *Union Pac. Railroad Co.* v. *Peniston, supra*; *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore, supra*; *Gromer* v. *Standard Dredging Co.*, 224 U.S. 362, 32 S. Ct. 499, 56 L. ed. 801; *Ackerlind* v. *United States*, 240 U.S. 531, 36 S. Ct. 438, 60 L. ed. 783; *Alward* v. *Johnson*, 282 U.S. 509, 51 S. Ct. 273, 75 L. ed. 496, decided February 24, 1931; see *Choctaw, O. & G. R. Co.* v. *Mackey*, 256 U.S. 531, 41 S. Ct. 582, 65 L. ed. 1076; *Group No. 1 Oil Corp.* v. *Bass*, 283 U.S. 279, 51 S. Ct. 432, 75 L. ed. 1032, decided this day."

In *Union Pac. Railroad Co.* v. *Peniston*, 18 Wall. 5, 21 L. ed. 787, cited in the above quotation, this Court pointed out that the taxing power of a state is one of its attributes of sovereignty that exists independent of the Constitution. That this power may be exercised to an unlimited extent upon all property, trades, business and avocations existing or carried on within its territorial boundaries; that this power is indispensable to a state's continued existence. The court there points out that a tax on a Federal agency is a "direct obstruction to the exercise of Federal powers."

but where the tax is laid upon the property "it is not imposed upon the franchise or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do." At page 33 of the Official Report, this Court said: "It may, therefore, be considered as settled that no constitutional implications prohibit a state tax upon the property of an agent of the government merely because it is the property of such an agent." The tax levied in the above case was an *ad valorem* tax on several miles of railroad. The railway company had been created by an Act of Congress and performed both military and postal service for the United States. It protested the tax on the theory that it was immune therefrom as a Federal instrumentality.

In *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, 58 S. Ct. 623, this Court points out that it has "always recognized that no constitutional implication prohibits a nondiscriminatory tax upon the property of an agent of the government merely because it is the property of such an agent used in the conduct of the agent's operations and necessary for the agency." (See Page 385 U.S. Report). *McCulloch* v. *Maryland*, 4 Wheat. 316; *Alward* v. *Johnson*, 282 U.S. 509, and *Union Pac. Railroad Co.* v. *Peniston*, *supra*, are cited. For a statement of the general rule, see Vol. 2, Cooley on Taxation, 4th Edition, P. 1288, Sec. 1607.

The only exception to the above rule seems to be in those cases where there is an attempt to levy an *ad valorem* tax on property lying within a Federal area. The tax in such instances is denied. It is denied for the sole and only reason that the United States has exclusive jurisdiction within the area. The theory being that the state has no more right to tax properties within a Federal area than it does to tax properties lying in another state.

The rule of law laid down in the above cited case is so well established that we will not burden this brief with further reference to opinions of this Court where the rule is announced.

We do wish to call the Court's attention to the fact that a property tax where levied on property lying within a state has never been considered to violate the commerce clause of the Constitution. if a property tax does not burden and regulate those engaged in interstate commerce, how can it be said such a tax burdens the appellees in the role of Federal instrumentalities? The rule of law contended for in connection with the fact that a property tax may be imposed on the properties of those engaged in interstate commerce is stated in Sec. 107, P. 462 of 15 C.J.S. as follows:

> "A state may, by any form of property taxation, tax property having a situs therein, notwithstanding it may belong to persons or corporations engaged in interstate commerce and may be used therein, although owned by foreign corporations or persons domiciled elsewhere. The fact that property is subject to regulations of congress as interstate commerce does not prohibit its local taxation * * *."

It is for this reason that states have always been permitted to tax railway depots and railway cars under the unit rule, etc.

We repeat that Oklahoma here seeks only to tax the properties of the appellees. The tax is imposed in connection with the 7/8 working interest and does not touch the 1/8 royalty interest. Oklahoma, in fact, has never sought to impose a gross production tax on the royalty interest of the restricted members of the Indian Tribes here involved. That the royalty interest of the restricted Indian is a separate and distinct property from that of the appellees is not subject to dispute. In the first syllabus of *McCullough* v. *Burks*, 185 Okla. 502, 94 Pac. (2d) 541, the Supreme Court of Oklahoma held that:

> "The word 'royalty,' as used in connection with oil and gas leases, conveyances, and reservations, has a definite meaning in its popular sense. It means a share of the products or proceeds therefrom, reserved to the owner of land for permitting another to use the property. *Carroll* v. *Bowen*, 180 Okla. 215, 68 Pac. (2d) 773."

We remind the Court that the restricted Indian reserved the 1/8 royalty interest and for this reason the appellees could have no property right therein. The gross production tax is in fact levied separately on the working interest and the royalty interest. By the second paragraph of Sec. 821, Title 68, O.S. 1941, *supra*, the tax is levied on the royalty interest, Sections 824 and 831 of the same title provide for collection of the tax on the royalty interest.

We admit that the Supreme Court of Oklahoma followed the theory advanced under this proposition in the case of *Large Oil Company v. Howard*, 63 Okla. 143, 163 Pac. 537. We submit that the opinion is sound and in accord with a large number of cases from this Court that are therein cited. In that case Oklahoma's right to impose a gross production tax on the properties used in producing from lands of the Osages was sustained. The Court points out that the tax imposed under the gross production statutes as they existed in 1916, was a property tax and that this Court had consistently permitted the imposing of this class of tax on the properties of a private Federal instrumentality. The case was reversed in this Court in a *per curiam* opinion. 248 U.S. 549, 39 S. Ct. 183. The authority given was the case of *Choctaw, O. & G. R.R. Co. v. Harrison*, 235 U.S. 292, 35 S. Ct. 27, and *Indian Ter. Illuminating Oil Co. v. Okla.*, 240 U.S. 522, 36 S. Ct. 453. We wish to examine these cases in order to show that they did not, in our opinion, justify a reversal of the Supreme Court of Oklahoma in the *Large Oil Co. case*.

In the *Choctaw, O. & G. R.R. Co. case, supra*, this Court had under consideration Section 6 of the Oklahoma Act approved May 26, 1908, under which a gross receipts tax of 2 per cent was levied on the gross receipts of coal produced. The railway company produced coals from mines belonging to the Choctaw and Chickasaw Indian Tribes. It protested payment of the tax on the theory that the tax was an occupation or privilege tax from which it was im-

mune as a Federal instrumentality. This Court agreed with the contention so made and held that the tax levied was an occupation tax. We submit that the following quoted language sustains our contention that the Court would have held otherwise had the tax levied been a property tax:

> "It is unnecessary to consider the power of the State of Oklahoma to treat coals dug from mines operated by the appellant as other personalty, and to subject them to a uniform ad valorem tax, for it seems to us clear that the Act of 1908 provided for no such imposition. Its very language imposes a 'gross revenue tax which shall be in addition to the taxes levied and collected upon an ad valorem basis.' We cannot, therefore, conclude that the gross receipts were intended merely to represent the measure of the value of property liable to a general assessment — provision is made for determining that upon a different basis.* * *"

Another distinction between the above referred to case and the instant case is that appellees here acquired a vested interest in the leasehold estate when production was obtained. *Brennan* v. *Hunter*, 68 Okla. 112, 172 Pac. 49. The lessee here has the right to produce the oil and gas to point of exhaustion. The properties here taxed are admittedly the properties of the appellees and no others have an interest therein.

We respectfully submit that the *Choctaw, O. & G. R. R. Co. case* does not support this Court's *per curiam* opinion in the *Large Oil Co.* case and did not justify the departure there made from a long line of cases holding that the properties of a private federal instrumentality were subject to a state property tax. The *Indian Territory Illuminating Oil Co. case* does in part support the *Large Oil*

Co. case. It is based, however, on the *Choctaw, O. & G. R. R. Co. case* and is, therefore, without sound basis. In the *I. T. I. O. case,* Oklahoma sought to impose an ad valorem tax on oil and gas leases covering lands of restricted Osages. The owner of the leases protested the tax on the theory that it was a federal instrumentality and as such immune from the tax. This Court sustained that theory and based its opinion on the proposition that "a tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them." This quotation is from the body of the opinion.

The tax here levied is not on leases. In fact, oil and gas leases are not subject to tax in Oklahoma. See *In re: State* v. *Shamblin,* 185 Okla. 126, 90 Pac. (2d) 1053. In fact minerals in place after severance are not subject to tax in Oklahoma, prior to production. See *State* v. *Shamblin, supra.* It follows that no departmental oil and gas lease covering lands of restricted Indians can or will be destroyed by any tax levied by Oklahoma. Repeating, the tax levied is on the properties of the appellees and an imposing thereof cannot destroy the power of the United States to make leases or the right of the restricted Indian thereunder to take the proceeds accruing from his full 1/8 royalty interest in the production. In brief, no right of the United States nor the Indian can or will be destroyed by the tax here levied. The lessor in an oil and gas lease always has the hope that the properties will be developed. If the lease is destroyed prior to development, then this hope and expec-

tancy is gone. This is apparently the thing that this Court said could be destroyed by the imposing of a tax on oil and gas leases prior to production.

The next case in point of time is the case of *Gillespie* v. *Oklahoma*, 257 U. S. 501, 42 S. Ct. 171. Oklahoma there imposed an income tax on income of a lessee. The income accrued from oil and gas produced from wells on the lands of a restricted Creek Indian. The Supreme Court of Oklahoma sustained the tax. On appeal the case was reversed on authority of *Choctaw, O. & G. R. R. Co., supra*, and the *I. T. I. O. case, supra*. The *Gillespie case* was reversed in *Helvering* v. *Mountain Producers, supra*.

The next case in point of time is *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 46 S. Ct. 592. An ad valorem tax was there assessed on lead and zinc ores mined by the company in 1920. The ores were mined under a lease covering the restricted lands of Quapaw Indians. At the time the tax was assessed, the ore was in the bins. The tax so assessed was in addition to a gross production tax. "It was assessed on the ores in mass, and the royalties or equitable interests of the Indians had not been paid or segregated." The State Supreme Court sustained the assessment. This Court reversed the case on the authority of the *Choctaw, O. & G. R. R. Co. case* and the *I. T. I. O. case*.

The case can be distinguished from the instant case for the reason that the tax was assessed on properties in which a restricted Indian owned an interest. No properties of a restricted Indian are here included in the assessment.

MR. JUSTICE MCREYNOLDS dissented. In his dissent he stated that he believed the tax to be remote and for such reason valid under the authority of *Central Pac. R. R. v. California*, 162 U. S. 91, 16 S. Ct. 766. This Court now so holds. We refer to the case of *Helvering v. Mountain Producers* and other cases of the same purport.

MR. JUSTICE BRANDEIS also dissented. His dissent is based upon the proposition that since the tax imposed was a property tax the imposing thereof should be allowed under a long line of decisions of this Court holding that there is no implied constitutional inhibition against a state imposing a property tax on the properties of a federal instrumentality. He cites many cases from this Court where this Court so held. See Page 617 of the U. S. Report. At the top of the same page he points out that,

> "* * * And we are dealing with a property tax, as distinguished from an occupation tax.* * *"

At page 619 of the same report, he says that,

> "I suspect that my brethren would agree with me in sustaining this tax on ore in the bins, but for *Gillespie v. Oklahoma*, 275 U. S. 501, * * *."

As aforesaid the *Gillespie case* was overruled in the *Helvering v. Mountain Producers case*. We are hopeful that the late Justice Brandeis' surmise was correct and that this Court will now agree with him and with us on the proposition that a state can impose a property tax on the properties of a private federal instrumentality. This Court has in fact so held repeatedly and consistently in all cases except those cases where the federal instrumentality was brought about through a lease on the lands of restricted Indians.

The next case in point of time is *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 52 S. Ct. 443. The Collector of Internal Revenue there imposed an income tax on the income of a lessee. The income accrued from oil and gas produced from wells located on school land owned by the State of Oklahoma. This Court there denied the tax on the theory that the lessee was a state instrumentality. The authority was the *Gillespie case, supra.* The *Coronado case* was overruled in *Helvering* v. *Mountain Producers, supra.*

MR. JUSTICE STONE dissented. He stated that the *Gillespie case* should be overruled; that the *Gillespie case* was in conflict with *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, 51 S. Ct. 432. At Page 404 of the U. S. Report, he points out that there was the exercise of a function concededly governmental; but in each case the only result, so far as the lessee was concerned, was the acquisition by him of certain property rights exclusively for his own benefit, which property rights this Court had always recognized as being taxable except where an Indian oil and gas lease was involved. We quote his language:

> "* * * In each case there was the exercise of a function concededly governmental; but in each the only result so far as the lessee was concerned, was the acquisition by him of certain property rights exclusively for his own benefit. In each the lessee was taxed on his profits, derived from his private business in the production and sale of oil and gas, which was his property. It cannot be said that the identical tax, thus levied, has any effect on Oklahoma differing from that on Texas. The fact, if it is a fact, that under the Oklahoma leases the lessees do not acquire ownership

of the oil or gas until they have severed it from the soil, but before its sale, while the lessees under the Texas leases acquire it immediately on receipt of their leases, presents no distinguishing feature. All acquire private rights by governmental grant, from the exploitation of which they have derived income, which, upon principles consistently applied by this Court, except in the Indian oil lease cases, and reiterated in the *Group No. 1 Oil Corporation case*, may be taxed as other income is taxed."

In the case of *Santa Rita Oil Co. v. State Board of Equalization*, 116 Pac. (2d) 1012, the Supreme Court of Montana had under consideration the proposition of whether or not a gross production tax and an operator's net proceeds tax levied by Montana on the 7/8 working interest of a lessee producing oil and gas under a lease covering trust patent Indian land, was impliedly denied under the Constitution. The Montana court held that the taxes so levied did not constitute such a direct and substantial interference with the functions of federal government as to be invalid. The basis of this decision was the *Mountain Producers case*. The court stated that the *Mountain Producers case* overruled the *Gillespie* and *Coronado cases* "and in so doing necessarily overruled the *Choctaw* and *Jaybird cases* and many others like them." We say that the phrase "many others like them" included the *Large Oil Company case* and any other case of the same purport.

We respectfully submit that there is no sound basis for holding that a federal instrumentality is exempt from state property taxes where the federal instrumentality is brought about because of the presence of a restricted Indian

and not exempt where the federal instrumentality is brought about through some other reason. We so say for the reason that no property rights of the Indian are involved or affected. The restricted Indian has nothing whatsoever to do with the federal instrumentality except the matter of bringing it into existence. His properties are neither taxed directly nor indirectly.

We submit that since the gross production tax here levied is a property tax imposed on the private property of the appellees, the right to impose the tax has always by this Court been sustained except in the Indian lease cases herein referred to, which cases were either expressly or impliedly overruled in the *Mountain Producers case*, that and irrespective of the correctness of our foregoing statement, the tax imposed does not burden a federal instrumentality under the doctrine of *Helvering v. Mountain Producers, supra*, and on that authority the assessment should be here sustained.

We assert that in the *Mountain Producers case* this Court completely departed from the line of decisions based on the *Choctaw, O. & G. R. R. Co. case*, in which decisions it had held that where the federal instrumentality was brought about because of the restricted status of the Indian the tax would be denied because it burdened the federal instrumentality but where the instrumentality was otherwise brought about the tax would not be denied. We also assert that when this Court departed from this erroneous line of decisions it returned to the well established line of

decisions under which it had held that no constitutional implications prohibited a state from imposing a nondiscriminatory property tax on a federal instrumentality merely because it is the property of the agent and used by the agent in conducting his operations as an instrumentality.

PROPOSITION No. 2

The taxes of 1/8 of 1c, and of one mill, levied on each barrel of oil produced are nondiscriminatory excise taxes that do not burden a federal instrumentality.

There was assessed in addition to the gross production tax discussed under the first proposition, an excise tax of 1/8 of 1¢ on each barrel of oil produced prior to July 1, 1943, and an excise tax of one mill on each barrel of oil produced after that date.

The 1/8 of 1¢ per barrel tax was assessed under an Act of 1941. See Okla. Sess. Laws 1941, p. 380. The levy was under Section (1) of the Act which later became Sec. 1218.1, Title 68, O. S. 1941. This Act was in effect until June 30, 1943. All excise taxes protested by the Texas Company were paid under this section.

In 1943, the Oklahoma Legislature enacted another Act of the same purport. See S. L. 1943, pp. 189 to 191. The Act became effective July 1, 1943. By the terms of this Act, the levy was one mill on each barrel of oil produced. The levying section was Section (1) of the Act, which later became Sec. 1220.1, Title 68, O. S. 1941, as amended. The Magnolia Petroleum Company was assessed taxes under both the 1/8 of 1¢ and the one mill levy.

The levying sections of the above referred to Acts, and for that matter the Acts themselves are in substance the same. It is for this reason that we believe it sufficient to merely set forth the levying section in the Appendix hereto. See Pages i to v hereof.

This excise tax is the tax that the parties refer to as the proration tax. These excise taxes were not levied for general revenue purposes. 6/7 of the tax is appropriated to the "Conservation Fund" and the remaining 1/7 to the "Interstate Oil Compact Fund of Oklahoma." The moneys are used by the Conservation Department and the Interstate Oil Compact Commission to defray the general expenses of those agencies in carrying out their functions as conservators of the natural resources of Oklahoma. It is the appellant's position that the restricted Indian benefited through the levy of these taxes. As the owner of land producing oil and gas, it was to his interest that the oil and gas in the pool underlying his land be conserved. If conserved, the ultimate recovery was increased all to his financial gain. If Oklahoma is permitted to impose this tax, the restricted Indian is benefited. To deny this tax is to deprive the restricted Indian of this benefit.

The Acts hereinbefore referred to were never under consideration by the Supreme Court of Oklahoma prior to the opinions in the instant case. However, a very similar Act was under consideration in the case of *Barnsdall Refining Company v. Oklahoma*, 171 Okla. 145, 41 Pac. (2d) 919. The Supreme Court of Oklahoma there held

that the tax levied was an excise tax. Oklahoma was there denied the right to impose the tax on oil produced from the lands of Osage Indians.

The decision in the above referred to case was based on the *Choctaw, O. & G. R. R. Co. case* and the line of decisions of this Court following that case. We discussed these cases under our first proposition. The case was appealed to the Court and affirmed. See 296 U. S. 521, 56 S. Ct. 340. The style on appeal to this Court, was, of course, reversed. The opinion of this Court in that case is based on the same line of decisions followed by the Supreme Court of Oklahoma. It is our position that these decisions were either expressly or impliedly overruled in the *Mountain Producers case*.

In the *Mountain Producers case* this Court held that the imposing of a federal net income tax on the income of a lessee accruing from oil produced from lands owned by a state, did not burden a state instrumentality thus created, or the exact opposite of what it had held in the *Coronado case, supra*.

We suggest that it is here unnecessary to determine whether or not a net income tax is an excise tax or a property tax. A majority of the courts hold that a net income tax is an excise tax. See Page 308 and Page 319 of 27 Amer. Jur. If the tax here under discussion be construed to be a property tax, the imposing thereof has always, by this Court, been permitted; excepting only in the Indian lease cases referred to in our first proposition. If the taxes

be construed to be excise taxes, then the imposing thereof is permitted under the authority of the *Mountain Producers case*.

See also:

New York v. United States,
326 U. S. 572, 66 S. Ct. 310.

It is true that the denomination "excise tax" is not very descriptive at this time. This name is now applied to all taxes that are not poll or property taxes. The tax under discussion is not a license or an occupation tax and would in fact clearly be a property tax if it were not for the fact that it does not have the essential ad valorem factor —the tax is not measured by value. It is in fact a direct property tax on the oil produced that does not have an ad valorem factor. See Sec. 33, 51 Am. Jur., pp. 61-62. In *Dawson v. Kentucky Distillers and Warehouse Co.*, 255 U. S. 288, 41 S. Ct. 272, this Court held that a tax of 50¢ a gallon on whiskey was a property tax and not an occupation tax.

In *Buckstaff Bath House Co. v. McKinley*, 308 U. S. 358, 60 S. Ct. 279, this Court held that a corporation operating a bath house as a private business for profit on a federal government reserve under a lease from the Secretary of the Interior, under which lease it was regulated by said Secretary as to number of bath tubs that might be used, the charge made to the public for service, the qualification of employees, the maintenance and care of the premises, etc., was not exempt from an excise tax levied by the State

of Arkansas in connection with the Arkansas Employment Compensation Act.

PROPOSITION No. 3

The taxes here imposed are nondiscriminatory taxes that do not burden a federal instrumentality. The effects of the taxes upon the Federal Government, if any, are extremely remote and inconsequential.

The taxes here assessed are nondiscriminatory taxes that do not burden the United States in any way, nor do they burden the restricted Indian. The taxes are not on or collected from properties of either the restricted Indian or the United States. It is to be remembered that it is not even necessary for the United States to engage in any form of administrative work because the taxes are imposed. As we have heretofore stated, the taxes are on the properties of the lessee. The matter of paying the taxes is wholly a matter between the appellees and Oklahoma. If the taxes are not paid, no properties of the United States or of the restricted Indian will be sold to satisfy the tax liability.

The only case that we have found that attempts to state wherein the tax has any effect upon a restricted Indian is the case of *Gillespie* v. *State of Oklahoma, supra.* This Court there stated that an income tax upon the net income of a lessee was "a direct hamper upon the efforts of the United States to make the best terms it can for its wards." In brief, by exempting the lessee from all state taxes a better bonus price could be obtained when the Indian's lease

was put up for sale. We say that whether this is true or not is conjectural. It is only a small portion of lands that are leased for oil and gas that ever prove productive. This being true, it is doubtful if the taxability or the absence thereof influences the price paid for the lease. Assuming it does influence the bonus price, is the amount thereof sufficient to offset the direct benefits the Indian receives from the State as the result of the State collecting the taxes? For example benefits in the form of schools, highways, etc. It seems to us that this line of reasoning is in effect this: The lessee is relieved from paying taxes to the State of Oklahoma and as a direct result of being so relieved, a portion of the taxes that it would otherwise pay to Oklahoma are indirectly passed back to the Indian in the form of an increased bonus price for the Indian lease. If Congress undertook to accomplish this by legislation, we submit that such legislation would be quickly struck down by this Court. It is to be remembered that the *Gillespie case* was reversed by the *Mountain Producers case* and we trust that this line of reasoning is no longer followed by this Court.

In *Smith* v. *Davis*, 322 U. S. 111, 65 S. Ct. 157, this Court appears to have considered the proposition of whether or not a state tax imposed on one of its contractors should be denied for the reason that the United States government could make a more advantageous contract with contractors if they were relieved from paying state taxes. This Court refused to follow such a theory. This is clearly reflected from the following quotation taken from Page 116 of the U. S. Report:

"* * * The assets of an independent contractor that are derived from the profits of a government contract stand in no preferred constitutional position so far as taxation is concerned. They too must bear their fair share of the tax burden. And as long as that burden is non-discriminatory, there is no basis for assuming that contractors will be any less willing to enter into construction contracts with the United States. Nor is such a tax likely to affect or impair in any way their ability to discharge their duties efficiently. There is thus no practical reason for immunizing open accounts of this nature from taxation."

In *State of Alabama v. King & Boozer*, 314 U. S. 1, 62 S. Ct. 43, this Court held that the imposing of a sales tax on purchases made by contractors under a government contract would not be denied even though the tax was in fact passed on to the United States.

This brief is probably already too voluminous. It is for this reason that we will merely cite, and in some instances quote from, cases handed down by this Court in recent years that conclusively establish that this Court is now committed to the proposition that the right of a state to impose a nondiscriminatory tax upon a federal instrumentality will not be denied where the tax does not directly burden the instrumentality. The leading case is probably the case of *Helvering v. Mountain Producers, supra.* At Page 358 of the U. S. Report, this Court held:

"In numerous decisions we have had occasion to declare the competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled by extending the constitutional exemption from taxation to those subjects which fall within the general application of nondiscriminatory laws, and where no direct burden is laid upon the governmental

instrumentality, and there is only remote, if any, influence upon the exercise of the functions of government.' *Willcuts* v. *Bunn*, 282 U. S. 216, 225, 51 S. Ct. 125, 127, 75 L. ed. 304, 71 A.L.R. 1260, and illustrations there cited. * * *"

Following the above quotation, this Court cites cases handed down by it that conclusively show that the trend is away from exempting a federal instrumentality from nondiscriminatory state taxes.

Fox Film Corporation v. *Doyal et al.*, 286 U. S. 123, 52 S. Ct. 546, antedates the *Mountain Producers case*. At Page 128 of the U. S. Report, this Court held in the *Fox Film case* that immunity from nondiscriminatory state taxes does not exist where no direct burden is laid upon the governmental instrumentality, and it is only a remote, if any, influence upon the exercise of the functions of government.

In *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, 63 S. Ct. 1284, Oklahoma was permitted to impose an estate tax on the estates of restricted Indian members of the Five Civilized Tribes. At Page 610 of the U. S. Report, this Court says that:

"Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927, 120 A.L.R. 1466, permitted States to impose income taxes upon government employees and *Helvering* v. *Gerhardt*, 304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427, permitted the federal government to impose taxes on state employees. *O'Malley* v. *Woodrough*, 307 U. S. 277, 59 S. Ct.

838, 83 L. ed. 1289, 122 A.L.R. 1379, overruled a previous decision which held that judges should not pay taxes just as other citizens and *Helvering* v. *Mountain Producers Oil Corp., supra*, repudiated former decisions seriously limiting state and federal power to tax. See, also, *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. ed. 384, and *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 82 L. ed. 155, 114 A.L.R. 318. The trend of these cases should not now be reversed."

In *New York* v. *United States*, 326 U.S. 572, 66 S. Ct. 310, the State of New York invoked the instrumentality rule in connection with the nondiscriminatory excise tax levied by the federal government on waters produced from a spring owned by the State of New York. The tax was sustained. At Page 581 of the U. S. Report, this Court said:

> "* * * in the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity."

At Page 578 of the U. S. Report in the above referred to case, this Court cites the *Mountain Producers case* with approval and also cites other cases from this Court that sustain our position here.

No claim is here made that Congress has expressly denied unto Oklahoma the right to impose the taxes assessed. In *Oklahoma Tax Commission* v. *United States, supra*, this Court held that tax exemptions are not granted by implication and if Congress intended to exempt the estate of the Indian from estate taxes it should say so in plain words. The Court there cites *Superintendent* v. *Commis-*

stoners. 295 U. S. 418, 55 S. Ct. 820, and quotes with approval therefrom as follows:

> " 'Wardship with limited power over his property' did not then 'without more, render [the Indian] immune from the common burden.' "

We, therefore, say that the fact that the appellees are to some extent regulated by the federal government, does not render their properties immune from the common burden.

PROPOSITION No. 4

There can be no implied immunity from the taxes assessed where the mineral interests were owned by non-Indians or unrestricted Indians.

We have proceeded so far on the theory that the appellees are federal instrumentalities where the lands of restricted Indians are involved. We have so proceeded because of the line of decisions of this Court where it has so held. It is true, generally speaking, that most of these cases were either expressly or impliedly overruled in the *Mountain Producers case*. However, we do not contend that the *Mountain Producers case* overruled these cases on the proposition that an entity occupying the position here occupied by the appellees is not a federal instrumentality. We suggest, and notwithstanding these opinions, it is extremely doubtful whether the appellees are in fact federal instrumentalities. Their functions and relations toward a restricted Indian are in no wise different from their functions and relations toward a non-Indian. They are admittedly engaged as private corporations in business for profit, and

they so engage whether the owner of the minerals be a restricted Indian or a non-Indian. This is established by the fact that upon the Indian's restrictions being removed the oil company continues to operate and perform the same functions — produces and sells oil and gas and accounts to the owner of the minerals — the same after the removal of the restrictions as it did before. The appellees will say that they are regulated. This was the contention made by the lessee in the *Buckstaff Bath House Co.* v. *McKinley case, supra.* This Court there held that the imposing of regulations by the federal government did not make the lessee a federal instrumentality. We submit this Court should so hold here. The regulations here imposed by the federal government are in substance the same as those imposed by Oklahoma on all producers of oil and gas. In fact, if they comply with the regulations imposed by Oklahoma they automatically comply with the regulations imposed by the federal government. We know of no line of decisions that holds that an oil company is an instrumentality of a state merely because it is regulated in the production phase of its business by the state.

Irrespective of the contention above made, this Court has held that the right to impose nondiscriminatory taxes such as here assessed, will not be denied a state where Congress has expressly consented to an imposing of the taxes on the interest owned by the Indian. It is true that Congress has not here expressly consented, but the 1/3 interest of the non-Indian Juana Pau Kune in Case No. 751,

(Mag. R. 18), and the 1/4 interest owned by the heirs of Kla-da-ing, Case No. 1750 (Mag. R. 14) [the deed conveying a fee simple unrestricted title of the heir, Mag. R. 64-65], surely takes the same status as does the interest of the restricted Indian, where consent to tax his interest has been given by Congress. The correctness of our contentions is established in the case of *British American Oil Producing Co. v. Board of Equalization of the State of Montana*, 299 U. S. 159, *supra*, where this Court held that the State of Montana would be permitted to impose a gross production tax and a net proceeds tax on the interest of the lessee under a departmental lease covering certain lands of members of the Black Feet Tribe. The lands of the Black Feet were not subject to alienation, but Congress had given its consent to the imposition of the taxes on the interest of the Indians.

See also:

Carter Oil Co. v. Oklahoma Tax Commission, 166 Okla. 1, 25 Pac. (2d) 1092.

In *Penn Dairies, Inc. v. Milk Control Commission*, 318 U. S. 261, 63 S. Ct. 617, this Court held at Page 269 of the U. S. Report that:

> "* * * those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions. * * *"

and cited a number of cases sustaining the rule of law announced. The lessees here admittedly do no more than render a service to the United States government.

It is our position that the taxes here assessed do not directly burden a federal instrumentality and for such rea-

son the assessments should be sustained in their entirety. If in this we be in error, then we say that at least Oklahoma should be permitted to impose the taxes here to the extent that the mineral rights are owned by non-Indians and non-restricted Indians.

PROPOSITION No. 5

Tax exemptions are not granted by implication.

This Court has repeatedly and consistently held that tax exemptions are not granted by implication. In *Oklahoma Tax Commission* v. *United States, supra*, this Court at 606 U. S. Report, expressed itself in the following language:

> "This Court has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co.* v. *Helvering*, 307 U. S. 57, 60, 59 S. Ct. 692, 693, 83 L. ed. 1104; * * *"

and there refused to hold that the estates of members of the Five Civilized Tribes of Indians were exempt from an Oklahoma estate tax.

In *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 48 S. Ct. 65, the respondent, Colonial Trust Co., as the executor of the estate of Glenn T. Braden, deceased, contended that Braden as the owner of a producing oil and gas lease covering certain lands of the Osage Tribe of Indians was a federal instrumentality and as such his income accruing from the lease was exempt from federal income taxes. The respondent also urged that the Indian lessors were exempt from such tax and for such reason Braden's income was

impliedly exempt. This Court held that the income was subject to tax. At Page 235 of the U. S. Report, the basis for this holding is given in the following language:

> "(2) Assuming that the Indians are not subject to the income tax, as contended, the fact that they are wards of the government is not a persuasive reason for inferring a purpose to exempt from taxation the income of others derived from their dealing with the Indians. Tax exemptions are never lightly to be inferred [*Vicksburg, etc., R. R. v. Dennis*, 116 U. S. 665, 668, 6 S. Ct. 625, 29 L. ed. 770; *Philadelphia & Wilmington, R. R. v. Maryland*, 10 How. 376, 393, 13 L. ed. 461], and we think any implication of an exemption of the income of the Indians themselves, if made, must rest on too narrow a basis to justify the inclusion of the income of other persons merely because the statute, if applied as written, may have some perceptible economic effect on the Indians."

We respectfully assert that no well founded reason can be presented in support of the appellees' contention that they are entitled to be impliedly exempt from the taxes here assessed. The appellees received and enjoyed the same benefits from the State of Oklahoma as did their competitors who did not happen to be producing oil and gas from the lands of restricted Indians. For such reason, no tax favoritism should be bestowed upon the appellees. Our position is succinctly stated in *Oklahoma Tax Commission v. United States, supra*, as follows:

> "Recognizing that equality of privilege and equality of obligation should be inseparably associated, we have recently swept away many of the means of tax favoritism. * * *"

CONCLUSION

The taxes here assessed were neither levied nor assessed on the properties of the United States government or of any restricted Indian. The effect of the levy and assessment, on the federal government, is extremely remote and inconsequential. The taxes do not burden the appellees as federal instrumentalities and do not deprive them of the power to serve the federal government as it was intended they should serve it. The decision of the Supreme Court of Oklahoma to the contrary should be reversed.

Respectfully submitted,

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JULY, 1948.

APPENDIX I

Section 821, Title 68, O. S. 1941, of the Oklahoma Gross Production Statutes reads as follows:

"Every person, firm, association or corporation engaged in the mining or production, within this State, of the aforesaid asphalt, or of ores bearing lead, zinc, jack, gold, silver, or copper, or of petroleum or other crude oil or other mineral oil, natural gas and/or casinghead gas, shall, monthly, file with the Oklahoma Tax Commission, a statement under oath, on forms prescribed by it, showing the location of each mine or oil or gas well operated or controlled by such person, firm, corporation or association during the last preceding monthly period; the kind of such mineral, oil or gas produced; the gross amount thereof produced; and the actual cash value thereof at the time and place of production, including any and all premiums received from the sale thereof; the amount of royalty payable thereon; and, where such royalty is claimed to be exempt from taxation by law, the facts on which such claim of exemption is based, and such other information pertaining thereto as the Oklahoma Tax Commission may require, and shall, at the same time pay to the Oklahoma Tax Commission, a tax equal to three-fourths of one per centum on the gross value of asphalt, ores bearing lead, zinc, jack, gold, silver and copper produced which is hereby levied and a tax equal to five per centum of the gross value of the production of petroleum or other crude or mineral oil which is hereby levied based on 42 U. S. gallons of 231 cubic inches per gallon, computed at a temperature of 60 degrees Fahrenheit for oil measurements and a tax equal to five per centum of the gross value of the production of natural gas and/or casinghead gas, which is hereby levied: Provided, however, that none of the provisions of this Act shall be construed to affect or impair the liability imposed upon the purchaser of petroleum crude oil or other mineral oil, natural gas and/or casinghead gas, by any law or laws

of the State of Oklahoma relating to the payment of gross production taxes by the purchasers of such petroleum crude oil or other mineral oil, natural gas and/or casinghead gas.

"The tax hereby levied shall so attach to, and is levied on, what is known as the royalty interest; and the amount of such tax shall be a lien on such interest.

"The Oklahoma Tax Commission shall have power to require any such person, firm, corporation or association engaged in mining or the production and/or purchase of such asphalt, mineral ores aforesaid, petroleum or other crude oil or other mineral oil, natural gas and/or casinghead gas, or the owner of any royalty interest therein to furnish any additional information by it deemed to be necessary for the purpose of correctly computing the amount of said tax; and to examine the books, records and files of such person, firm, corporation or association; and shall have power to conduct hearings and compel the attendance of witnesses, and the production of books, records and papers of any person, firm, association or corporation.

"Any person or any member of any firm or association, or any officer, official, agent or employee of any corporation who shall fail or refuse to testify; or who shall fail or refuse to produce any books, records or papers which said Oklahoma Tax Commission shall require; or who shall fail or refuse to furnish any other evidence or information which said Oklahoma Tax Commission may require; or who shall fail or refuse to answer any competent questions which may be put to him by said Oklahoma Tax Commission, touching the business, property, assets or effects of any such person, firm, association or corporation, relating to the gross production tax imposed by this or other Acts, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than $500.00, or imprisonment in the jail of the county where such offense shall have been committed, for not more than one year, or by both such fine and imprisonment; and each day such refusal on the part of

such person shall constitute a separate and distinct offense.

"The Oklahoma Tax Commission shall have the power and authority to ascertain and determine whether or not any return herein required to be filed with it is a true and correct return of the gross products, and of the value or volume thereof, of such person, firm, corporation or association engaged in the mining or production of asphalt and ores bearing minerals aforesaid and of petroleum or other crude oil or mineral oil and of natural gas and/or casinghead gas; and if any person, firm, corporation or association has made an untrue or incorrect return of the gross production or value or volume thereof, as hereinbefore required, or shall have failed or refused to make such return, the Oklahoma Tax Commission shall under rules and regulations prescribed by it, ascertain the correct amount of either, and compute said tax.

"The payment of the taxes herein imposed shall be in full, and in lieu of all taxes by the State, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon producing leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver, or copper, or for petroleum or other crude oil or other mineral oil, or for natural gas and/or casinghead gas, upon the mineral rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil, or natural gas and/or casinghead gas, or any mine producing asphalt or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or other property hereinbefore in this paragraph mentioned or described; and any interest in the land, other than that herein enumerated, and oil in storage, asphalt and ores

bearing minerals hereinbefore named, mined, produced and/or on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year, shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.

"No equipment, material or property shall be exempt from the payment of ad valorem tax by reason of the payment of the gross production tax as herein provided except such equipment, machinery, tools, material or property as actually necessary and being used and in use in the production of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper or of petroleum or other crude oil, or other mineral oil or of natural gas and casinghead gas; and it is expressly declared that no ice plants, hospitals, office buildings, garages, residences, gasoline extraction or absorption plants, water systems, fuel systems, rooming houses and other buildings, nor any equipment or material used in connection therewith shall be exempt from ad valorem tax.

"The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall, take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated and also the value of oil, gas, asphalt or any of the said mineral ores produced and any other element of value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said Board to said court; provided, that after such tax has been collected and distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or con-

sidered. R.L. 1910, § 7464; Laws 1913, Ch. 240, P. 639, Art. 2, Subd. A, § 1; Laws 1915, Ch. 107, Art. 2, Subd. A, § 1; Laws 1916, Ch. 39, P. 102, § 1; Laws 1933, Ch. 103, P. 202, § 5; Laws 1935, P. 271, § 1."

APPENDIX II

Section 1220.1, Title 68, O. S. 1941, under which the petroleum or excise tax was levied, reads as follows:

"There is hereby levied an excise tax of one (1) mill per barrel on each and every barrel of petroleum oil produced in the State of Oklahoma, which is subject to Gross Production Tax in the State of Oklahoma. Such excise tax of one (1) mill per barrel shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as is now provided by law for the collection of gross production tax on petroleum oil. On petroleum oil sold at the time of production, the excise tax thereon shall be paid by the purchaser, who is hereby authorized to deduct in making settlement with the producer and/or royalty owner the amount of tax so paid; provided that, in the event oil on which such tax becomes due is not sold at the time of production, but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself, including the tax due on royalty oil not sold; provided further, that in settlement with the royalty owner, such producer shall have the right to deduct the amount of tax so paid on royalty oil, or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of tax paid. Laws 1947, P. 462, § 1."